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WASHINGTON, A. & MT. V. RY. CO. *v.* VAUGHAN.

Jan. 12, 1911.

[69 S. E. 1035.]

1. **Carriers (§ 280*)—Passengers—Carrier's Duty.**—A carrier owes to actual and constructive passengers a higher degree of care than to travelers at highway crossings.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1085; Dec. Dig. § 280.* 2 Va.-W. Va. Enc. Dig. 701, et seq.]

2. **Carriers (§ 333*)—Alighting Passengers—Duty.**—An alighting passenger is entitled to reasonable protection against accident in passing from the station premises, but must use proper care to avoid danger; the degree required depending upon the particular circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385-1397; Dec. Dig. § 333.* 2 Va.-W. Va. Enc. Dig. 703, 707.]

3. **Carriers (§ 337*)—Alighting Passengers—Contributory Negligence.**—That while crossing double tracks to a station shed in the nighttime an alighting electric railway passenger was struck by a train running in the opposite direction without headlight displayed or giving warning does not show contributory negligence as a matter of law, though he failed to look and listen after alighting from his train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1402; Dec. Dig. § 347.* 2 Va.-W. Va. Enc. Dig. 707, et seq.]

4. **Carriers (§ 317*)—Electric Railways—Injury to Passengers—Evidence.**—In an action by an alighting electric railway passenger struck in the nighttime by an unlighted train running in the opposite direction, it was not error to receive testimony on the commonly known fact that trolley poles frequently become detached, and that lights in cars are thereby extinguished.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.* 1 Va.-W. Va. Enc. Dig. 592, et seq.]

5. **Evidence (§ 131*)—Existence of Thing at Another Time.**—Prior or subsequent existence of a thing is some indication of its probable existence at a given time; the degree of probability arising from existence at a subsequent time depending upon the likelihood of some circumstance intervening, but the admission of such evidence is largely discretionary with trial courts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 399-402; Dec. Dig. § 131.* 11 Va.-W. Va. Enc. Dig. 328.]

6. **Carriers (§ 317*)—Injury to Passenger—Evidence—Existence of Thing at Another Time.**—In an action by an alighting passenger

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

for injury to one struck in the nighttime by an electric car, involving an issue whether the car was lighted, it was not an abuse of discretion to exclude testimony showing that the lights were burning about 15 minutes after the accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.* 5 Va.-W. Va. Enc. Dig. 312; 11 id. 328.]

7. Negligence (§ 122*)—Contributory Negligence—Burden of Proof.—The rule that the burden is on defendant to show contributory negligence is subject to the qualification that the showing on plaintiff's case is available to defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 232; Dec. Dig. § 122.* 10 Va.-W. Va. Enc. Dig. 406, 407.]

8. Negligence (§ 138*)—Instructions—Contributory Negligence—Burden of Proof.—An instruction that the burden was on defendant to show contributory negligence unless the "evidence of plaintiff himself" showed it was erroneous as tending to exclude consideration of testimony of plaintiff's witnesses other than himself.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 355; Dec. Dig. § 138.* 10 Va.-W. Va. Enc. Dig. 406, 412.]

9. Carriers (§ 303*)—Alighting Passengers—Carrier's Duty.—That the way across railway tracks used by an alighting passenger in going to the station was a public highway did not affect the degree of care owing him by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 303.* 2 Va.-W. Va. Enc. Dig. 700, 702.]

10. Appeal and Error (§ 1066*)—Harmless Error—Instructions.—An instruction as to the duty of a railway company to a traveler on a highway, while erroneously given in an action for injury to an alighting passenger, was harmless to the company, since there is a higher duty to passengers than to travelers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.* 1 Va.-W. Va. Enc. Dig. 600, et seq.]

11. Carriers (§ 280*)—Electric Railways—Duty to Passengers.—It was not error to instruct that electric railway companies must use the greatest possible care and diligence for their passengers' safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1087; Dec. Dig. § 280.* 2 Va.-W. Va. Enc. Dig. 700, et seq.]

12. Negligence (§ 140*)—Instructions—Proximate Cause.—An instruction making defendant liable if he was negligent unless plaintiff was guilty of contributory negligence is erroneous as ignoring the necessity that the negligence proximately caused the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 378-381; Dec. Dig. 140.* 10 Va.-W. Va. Enc. Dig. 372, et seq.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Error to Circuit Court, Alexandria County.

Action by Wyatt Vaughan against the Washington, Alexandria & Mt. Vernon Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Moore, Barbour & Keith and *Jas. R. & H. B. Caton*, for plaintiff in error.

Lewis H. Machen and *R. C. L. Moncure*, for defendant in error.

WOOLFOLK et al. v. GRAVES et al.

Jan. 12, 1911.

[69 S. E. 1039.]

1. Injunction (§§ 118, 208*)—Trespass—Sufficiency of Bill—Conformity of Decree to Pleadings.—A bill to restrain cutting timber on land described alleged that the land was part of a tract left for life to complainant E., remainder to W., and complainant D.; that W. transferred his interest to E., and recited the will book in which the will was recorded and the page of the book, and exhibited the deed of W. to E., alleged possession since 1873, and that the timber was kept for the maintenance of buildings and fences on the rest of the tract; that complainants had very little timber aside from that which could be used for that purpose; that the injuries could not be adequately compensated; that defendants were of doubtful solvency, and claimed the land by reason of the erroneous location of the boundary line of their adjoining land, and prayed for an injunction and general relief. Held, that the bill sufficiently set out complainants' title, and that the timber was essential to the enjoyment of their land, and that without equitable interference they would suffer irreparable injury, and that a decree fixing the location of the boundary line and perpetually enjoining defendants from further trespassing on complainants' land did not go beyond the scope of the bill.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242, 430-432; Dec. Dig. §§ 118, 208.* 7 Va.-W. Va. Enc. Dig. 526, et seq.; 2 id. 610.]

2. Injunction (§ 194*)—Relief Granted—Complete Relief.—In a suit to restrain defendants from cutting timber on land claimed by complainants and in their possession, to which defendants, who owned adjoining land, claimed title as being a part of their land under a survey which located the boundary line so as to include the land in question, the court, in addition to granting an injunction, may also adjudicate the title, as jurisdiction in equity, having once attached

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.